

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 1 OF 2018

REPUBLIC APPLICANT

VERSUS

KENYA REVENUE AUTHORITY..... RESPONDENT

AND

KENOL KOBIL LTD..... INTERESTED PARTY

EX-PARTE

RAYAN LOGISTICS LTD EX-PARTE APPLICANT

JUDGMENT

1. In a judgment dated 07/03/2019, this Court dismissed a Judicial Review Application brought by the Applicant seeking for orders of certiorari and prohibition respecting certain tax demands made by the Respondent against the Applicant. In reaching that determination, the Court rendered itself thus:

Given the analysis of the Court on all the issues presented, it follows that the Applicant cannot succeed in any of the reliefs it sought. First, the Court has found that the Applicant acted prematurely in filing this suit in Court before exhausting statutory remedies. Second, the Court has concluded that the Respondent acted within its powers and mandate; did not act unreasonably or irrationally; and did not violate the legitimate

expectations of the Applicant. Consequently, the Applicant is not entitled to the reliefs sought.

- 2.** The Applicant is dissatisfied by this outcome. It has timeously filed an appeal to the Court of Appeal. It has also brought the present Application before this Court. The substantive prayer in the Application is that *“pending the hearing and determination of the Applicant’s appeal to the Court of Appeal, this Honourable Court do grant a conservatory order prohibiting the Respondent from enforcing the decision/tax demand entries 2017NKU 130226, 2017NKU 130227 and 2017NKU 130228 by Kenya Revenue Authority dated 16th December, 2017.”*
- 3.** The main grounds for the Application are stated on the face of the Application. They are that:
 - a.** “If the Respondent proceeds with the enforcement of the impugned tax demands the appeal by the Applicant to the Court of Appeal will be rendered nugatory.”
 - b.** The Applicant stands to suffer irreparable loss and damage if a conservatory order prohibiting the implementation of the impugned tax demands is not granted.
 - c.** The Applicant is ready and willing to comply with any reasonable condition that may be ordered by this Honourable Court.
 - d.** If the impugned tax demands are enforced, this will render the appeal an academic exercise if it were to succeed.

- e.** The Applicant's appeal at the Court of Appeal has high chances of success and thus the need for the Honourable Court to grant conservatory orders prohibiting the implementation of the impugned tax demands.
- f.** In principle and in the wider interests of justice and along the practice of the Honourable Court, it is only just and meet (sic) that a conservatory order be granted prohibiting the enforcement of the impugned tax demands pending the hearing and determination of the appeal preferred in the Court of Appeal.

4. The Application is vehemently opposed. The Respondent filed Grounds of Opposition raising a whopping 13 grounds. In its filed Written Submissions, the Respondent, however, re-classified the grounds under three headings:

- a.** That the Court has no jurisdiction to grant the orders sought.
- b.** That the judgment amounted to negative orders which are incapable of being stayed.
- c.** That the balance of convenience is in favour of the Respondent and against the issuance of the orders sought.

5. The Application was argued by way of Written Submissions. Mr. Akango, Counsel for the Applicant also highlighted orally on the date set for hearing.

6. I have now considered the Application; the affidavits filed in support; the Grounds of Opposition; the respective Written Submissions of the parties as well as the oral submissions by Mr. Akango. I have no

intention to unnecessarily lengthen this ruling by rehashing and restating the parties' respective positions.

7. The first issue for determination is whether the Court is *functus officio* and has been stripped of authority to consider the Application by dint of section 8(3) and (5) of the Law Reform Act. The Respondent ponderously argues that this Court has no jurisdiction to consider the Application; and that the only recourse for the Applicant is to appeal against the decision of the Court to the Court of Appeal.
8. I had difficulties understanding the tenor this argument. The cases cited by the Respondent – ***Republic v Lutta Kasamani T/A Kasamani & Co. Advocates ex parte United Insurance Company [2005] eKLR*** and ***Republic v Clerk County Council of Meru [2012] eKLR*** do not support the position taken by the Respondent at all. The former case (Lutta Kasamani Case) dealt with the question whether the High Court had jurisdiction to reinstate a Judicial Review Application which had been dismissed for non-attendance. The latter case (Clerk County Council of Meru) dealt with the question whether the High Court could review orders given in a Judicial Review Application.
9. Needless to say, the issues canvassed in the two cited cases are not even analogously the issues here. The issue here is whether the Court should give a conservatory order to preserve the subject matter of the suit pending an appeal to the Court of Appeal. Numerous cases have held that the High Court has jurisdiction to consider that question. Perhaps this is once instance the use of the word “trite” would suffice.

10. The next issue for determination is whether the orders given by the Court – dismissing the Judicial Review Application – are orders capable of being stayed. There is a long line of cases which have held that such a negative order cannot be stayed. The Respondent cited and relied on many of these cases. For example, the Court of Appeal held in **William Wambugu Wahome v Registrar of Trade Unions & Another [2006] eKLR**:

By dismissing the Judicial Review Application, the Superior Court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal.

11. Similarly, in **Cooperative Bank Limited v Banking Insurance & Finance Union Kenya (Nairobi App. No. 133 of 2017)**, the Court of Appeal (Kantai JA) held that:

An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with.... The Court has identified negative orders that are incapable of execution.

Consequently, an order for stay of execution cannot be issued in respect of such an order.

12. I have had occasion to deal with this question in the past. In **John Mbuu Muthoni & Another v Ruth Muthoni Kariuki (2017) eKLR**, after reviewing applicable case law, I concluded thus:

*33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in **R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR**. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances.*

*34. I am persuaded that the circumstances here are the same as those in the **Wananchi Group Case** which I find to be persuasive. It is in accord with the **James Hoseah Gitau Mwara Case** cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be "executed." A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought*

by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.

13. The Applicant is aware of the position of our law on this question.

His Counsel was, to his credit, so acutely aware that he pointed out to the Court from the outset that he was not seeking stay of execution. Instead, he argued with some conviction, that what he was seeking were *conservatory* orders. He therefore insisted that all the arguments raised to the effect that a negative order cannot be stayed were irrelevant. What was relevant was to consider whether the conditions for grant of conservatory orders under Article 23 of the Constitution were met. If met, the Applicant's Counsel argued, conservatory orders could be issued even where what is being appealed against is a negative order.

14. The Applicant supported its position primarily with two cases: the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** and ***Katiba Institute v Attorney General & 9 Others [2018] eKLR***. While the former case is famous for characterizing conservatory orders as public law reliefs, the latter case appears more on point. In that case, the Applicant had had its case dismissed in the High Court. It sought some conservatory orders pending the hearing and determination of the appeal it had filed at the Court of Appeal. Since its case had been dismissed by the High Court, like here, the Applicant did not seek "stay". The Court of Appeal seemed to agree that conservatory orders might be available in such situations if the Applicant met the threshold. The Court expressed itself thus:

*In the instant case, the Applicant in seeking a conservatory order submitted that the essence of a conservatory order is well captured in the case of **Butt v Rent Restriction Tribunal (1979) eKLR** where it was expressed that a Court ought to see to it that an appeal if successful, is not rendered nugatory and that availability of better remedy to the Applicant at the conclusion of the proceedings is no bar to a conservatory order. Counsel further submitted that the essence of the jurisdiction of this Court under Rule 5(2)(b) is to protect the subject matter of appeal...*

- 15.** The question becomes whether an unsuccessful party in a Judicial Review Application can functionally get a “stay” of the underlying decision the party had protested in its substantive Judicial Review Application by refashioning its application as a “conservatory order” rather than a “stay of execution”. The **Katiba Institute Case** seems to suggest that there is a narrow category of cases where a Court may invoke its inherent jurisdiction as well as Article 23 of the Constitution to grant conservatory orders aimed, primarily, at preserving the subject matter of the appeal in appropriate cases. In this narrow category of cases, the Courts would be willing to grant such conservatory orders even where the orders appealed against are “negative orders” not capable of being stayed in the “traditional way.”
- 16.** Conservatory orders are available where certain fundamental rights of an individual are at stake or where public order, the rule of law or public interest is at stake; and the situation can only be remedied in the interim by granting interlocutory orders. However, as the Court in

the ***Katiba Institute Case*** stated, the conservatory orders must be merited for them to be granted.

17. From the decisional landscape, I can glean four conditions which must be satisfied for a conservatory order to be issued post-judgment where the trial Court has not issued any positive orders capable of being stayed:

- a.** *First*, the Applicant must demonstrate that what it seeks to preserve verges on fundamental rights of an individual or is imperative for the protection of the public interest or order or rule of law; and that if the conservatory order is not issued the potential breach of the fundamental right or rule of law is demonstratably and irredeemably injurious;
- b.** *Second*, the Applicant must demonstrate that the appeal it has preferred is arguable;
- c.** *Third*, the Applicant must show that the appeal will be rendered nugatory if the conservatory order is not granted.

18. Has the Applicant satisfied these conditions? There is little doubt that the appeal filed in this case is eminently arguable. The Applicant contests the Court's finding that the doctrine of exhaustion applied to the case; and that, in any event, the Applicant is persuaded that the Court erred in not finding the tax assessment unreasonable as a matter of law. These are points worthy of pursuit on appeal. An arguable appeal is not one guaranteed to succeed but one that raises at least one point that merits serious consideration by the appellate Court. The appeal herein easily meets this threshold.

19. What about the other two conditions? It is perhaps best to reproduce the Applicant's counsel's best attempt at presenting its case in this regard. It is in paragraphs 19 and 20 of its Counsel's written submission. It goes thus:

19. The fact that the Respondent seeks to enforce the impugned tax notices which require the Applicant to pay the sum of Kshs, 3,954,672/- means that inevitably the Applicant faces the prospect of suffering substantial and irreparable loss.

It also follows that if the Applicant pays the subject sums of amount (sic), which is the same amount whose legality is being contested in the appeal at the Court of Appeal, then the appeal would be rendered nugatory. The Applicant seeks a conservatory order to stop payment of the subject sums to preserve the status quo and conserve the subject matter of the intended appeal. If the very sums whose legality is being contested is paid, then the intended appeal shall be rendered an academic exercise and the substratum of the appeal would fundamentally be altered.

20. This summary immediately makes clear one obvious fact: the conservatory order that is being sought is to stop the Respondent from demanding tax amounting to Kshs. 3,954,672/-. This is a liquidated and known amount. As is well accepted, money is eminently fungible. It can be refunded. And there is no claim that the Respondent is about to suddenly become illiquid and unable to refund the sums should the Applicant prevail on appeal.

21. The Applicant's application faces two difficulties. First, there has been no demonstration whatsoever that any of its fundamental rights is at stake and needs the Court to use its discretion to grant a conservatory order at this stage. Secondly, the Applicant has not demonstrated how the payment of the sums demanded would render the appeal nugatory or an academic exercise as it submitted.

22. In ***Coastal Bottlers Limited v The Commissioner Domestic Taxes (Nairobi Court of Appeal Civil Application No. 91 of 2008)***, the Court remarked as follows:

Even if we assume in favour of the Applicant that its intended appeal, which up to now has not been filed, is arguable and is not a frivolous one, the Applicant was still obliged to show to the Court that the success of the intended appeal would have been rendered nugatory if we refuse to grant the order of stay now sought before us.

We may also add that no relevant evidence was placed before the Court e.g. the balance sheet of the Applicant, from which we could come to the conclusion that if the Applicant was to be compelled to pay the outstanding balance, it might be forced out of business.

23. I find the situation here to be on all fours with the above-referenced case. I have no doubt that the Applicant has an arguable appeal. However, the Applicant has failed to show that any fundamental right is at stake; and more importantly, it has failed to show that the appeal would be rendered nugatory if the conservatory orders are not issued.

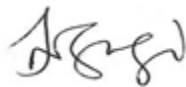
There has been no showing that either the Respondent would be unable to refund the amounts paid or that payment

24. Consequently, this application must meet the only fate fit for it: it is dismissed with costs.

25. However, due to the prevailing economic conditions caused by the COVID-19 Pandemic and the ensuing economic downturn which the Court takes judicial notice of, I will *suo motto* exercise the Court's discretion to grant an interim conservatory order of ninety (90) days to give the Applicant time to raise the taxes demanded. The interim conservatory order granted herein shall automatically expire on the nine-first day of today.

26. Orders accordingly.

Dated and delivered at Nakuru this 22nd day of April, 2020



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JOEL NGUGI
JUDGE

NOTE: This ruling was delivered by email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Applicant, B.O. Akang'o. Advocates and Counsel for the Respondent, J.K. Lavuna, Advocate, consented in writing to the delivery of the ruling by email.